SUBJECT INDEX

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Textbooks

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Appellants,

vs.

ROBERT LARUE, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California

BRIEF FOR THE APPELLEES.

Questions Presented.

May the State of California suspend, revoke or in any manner discipline a liquor licensee if he permits conduct to occur on the premises when such conduct occurs as an integral part of First Amendment expression, and such expression is not obscene within *Roth v. U.S.* and its progeny?

Do the ALCOHOLIC BEVERAGE CONTROL RULES in question abridge free speech on their face?

If so, may the State of California constitutionally proscribe such conduct on liquor licensed premises under all circumstances?

Where all of the alleged evil results sought to be cured by the ALCOHOLIC BEVERAGE CONTROL RULES challenged herein are prohibited by independent Penal Statutes, may the State of California constitutionally proscribe the conduct therein, which conduct is "prima facie" protected by the First Amendment?

Statement of the Case.

In addition to the statement of facts set forth in appellant's brief, appellees would call the court's attention to certain stipulations contained in the pre-trial order filed with the District Court. In the joint pre-trial order, all parties stipulated to the following facts:

"(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of on-sale Alcoholic beverage licenses issued by the defendants.

"(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverage premises of some of the licensee plaintiffs.

"(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the State of California and was and is established by the Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

"(f) The defendants enacted Department Rules 143.2, 143.3, 143.4, 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The

Rules apply statewide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4 and 143.5 of Title 4 of the California Administrative Code.

"(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverages premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3.

"(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

". . .

"(j) All of the licensee plaintiffs' premises are open to the public.

"(k) The defendants intend to and will take disciplinary action against the alcoholic beverage licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

"(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverage licenses are suspended or revoked.

"(m) An actual controversy exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question."

In addition, certain facts were not admitted by appellant, but appellant did not contest the facts by evidence to the contrary. The facts were as follows:

"(b) Plaintiff licensees:

"(i) prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the non-entrance of minors; and

"(ii) present entertainment that cannot be viewed from outside the premises; and

"(iii) post conspicuous signs at the entrances which read as follows: 'IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN", and "WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO NOT ENTER"; and

"(iv) display signs and advertisements which convey only, normal description of the entertainment, e.g.,

"Nude Entertainment".

ARGUMENT.

I.

The Issue Is Not Whether the Acts and Conduct Proscribed by the Rules, in and of Themselves, Constitute "Speech" but Rather When They Are Contained Within the Context of a Dance, Play, Film, Burlesque, Etc., Constitute "Speech".

Some of the *La Rue* appellees herein are dancers and are employed by other appellees who hold valid ALCOHOLIC BEVERAGE CONTROL licenses. The latter are bar owners and nightclub owners in Los Angeles.

Rule 143.3 refers to "live entertainment" from which the proscribed exception is carved. Rule 143.4 refers to the "showing of film, still pictures, electronic reproduction and other visual reproductions . . ."

The appellees' dancers are known as "topless" and "bottomless" in that they dance "nude" on a stage in a bar or nightclub before a live audience. Other appellees exhibit motion pictures on their premises which would violate Rule 143.4. Though the appellees herein do not offer their patrons other forms of entertainment, it is to be noted that the Rules would proscribe all phases of the performing arts, *i.e.*, burlesque, vaudeville, plays, etc.

All forms of the performing arts, including dancing, are means of expression intended by the Constitution to be protected by the First Amendment.

> "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all."
>
> *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

A common threat woven throughout the history of the dance is that it is an expression of emotions. Fertility, marriage, medicine, war and funerals have formed only the broader categories of innumerable dances which related man to his time and places.

> "Dancing consists in the rythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas."
>
> *7 Encyclopaedia Brittannica,* (1945) 13-14.

The purpose of dance has been communication as a "fundamental remedy for man's anxiety and loneliness". *Meerloo, The Dance,* p. 22 (1960). Dance is used as an outlet for hostilities and passions in societies around the globe. The poet Rilke believed the same emotional tapping of the "furies" of man could be obtained vicariously. And further, at p. 39, *Meerloo* goes on to say:

> "Man's need for temporary regression and revitalization . . . are actively satisfied . . . by identifying with dancers on the stage."

In 1623, *DeLauze* wrote *Apologie de la Danse* in defense of the dances new to his era. *DeLauze* justified the variety of new dance forms by citing scripture and the masters of antiquity. From *Plutarach's* note of dance to relieve shock on the battlefield to *Homer's* declaration that "assemblies and feasts cannot be enlivened except by the dance" mankind has used dance to communicate the whole spectrum of human emotions. Those who were inveighing against the new dances of the seventeenth century as "entertaining vice" and offering "enticement to debauchery" sought to make a distinction between traditional dances and the

new controversial ones. *DeLauze* pointed out that the distinction rested upon the customs and orthodoxies the traditional dances were held to communicate and not upon the new dancer *per se*. ". . . the dance itself cannot be blameworthy". *DeLauze, Apologie de la Danse,* p. 61 (1623).

To the argument that it was not steps and measures of the dance but the venuses who led men ". . . in the contemplation of an amorous object, and which finally is followed by a thousand evil desires of concupiscense", *DeLauze, supra,* at page 71, answered, "Whoever would (be offended), he himself is the author of his offense".

The defense of dance during any period of history cannot be separated from other modes of expression. Dance is only a portion of the whole and reflects no more or less than the movement within all the communicative arts. *DeLauze's Apologie* is to be understood in these terms.

> "In this the art of dancing merely reflects the pattern of life, for similar changes in language . . . dress, music . . . the theatre and so forth occurred during this period".
>
> *DeLauze, supra,* p. 32.

As it was three centuries ago, so it is today; a new mode of dance is seen by some as a threat to society's morals, when in reality the dance is only one of many areas of communication in the process of expansion.

> "The twentieth century has rediscovered the body; not since antiquity has it been so loved, felt and honored. Nobody really aware of what is taking place today needs to be told this . . . our generation does not find what it wants in the bal-

let . . . [and] in gossamer skirts. It cries out . . . for nature and passion".

Sachs, World History of the Dance, p. 477 (1963).

The California Courts have ruled that a dance is "speech".

"THE PERFORMANCE OF A DANCE FOR AN AUDIENCE CONSTITUTES A METHOD OF EXPRESSION THAT, IN THE ABSENCE OF PROOF OF OBSCENITY, WARRANTS THE PROTECTION OF THE FIRST AMENDMENT."

In re Giannini, (1968) 69 Cal. 2d 563; 72 Cal. Rptr. 655, 446 P. 2d 535.

This Court has held that motion pictures come within the ambit of the Constitutional guarantees of freedom of speech and of the press.

Jos. Burstyn, Inc. v. United States, (1962) 343 U.S. 495;

Jacobellis v. Ohio, (1964) 378 U.S. 184;

Pinkus v. Pitchess, 429 F. 2d 416, Aff'd. *sub nom;*

California v. Pinkus, 400 U.S. 922.

The performance of a play is protected by the First Amendment. *Schacht v. United States,* (1970) 398 U.S. 58.

"We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right . . . Though we see nothing of any possible value to

society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

Winters v. New York, (1948) 333 U.S. 507, 510 [92 L. Ed. 840, 847, 68 S. Ct. 665].

II.

The California Department of Alcoholic Beverage Control May Not Impose Restrictions on Licensees Which Deprive Them of Rights Secured by the First Amendment.

A. Restrictions on Entertainment in Bars and Taverns Are Not Authorized by the Twenty-First Amendment.

The rules which are the subject of this proceeding are designed to regulate the content of live entertainment, motion pictures and other forms of visual reproductions which may be exhibited or presented to patrons in bars and taverns in the State of California. However, the rules do not in any way restrict the importation, transportation, consumption or sale of alcoholic beverages. Therefore, the rules cannot be said to be justified or authorized by any authority granted the states by the Twenty-First Amendment which repealed prohibition.

Section 2 of the Twenty-First Amendment provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

By its own terms the Twenty-First Amendment is concerned with the transportation or importation of intoxicating liquors into a State when the intended delivery or use of such liquor would violate state law.

Traditionally, the courts have characterized the Twenty-First Amendment as being for the purpose of permitting states to legislate in a manner which would otherwise violate the commerce clause. *Carter v. Virginia,* 321 U.S. 131 (1944); *State Board of Equalization v. Youngs Market,* 299 U.S. 58 (1936). However, state liquor regulations are not thereby rendered immune from the commerce clause in all circumstances. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 42 (1966); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964). In *Idlewild* the court held that liquor could be sold free of state tax when sold for delivery in a foreign country, stating, at 377 U.S. p. 332:

> "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."

Idlewild is not the only case in which the Twenty-First Amendment has been restricted to regulation of transportation *into* the state. In *Collins v. Yosemite Park Co.,* 304 U.S. 518 (1938) the court held that a state could not prohibit shipment through its territory into a national park. In *Johnson v. Yellow Cab Co.,* 321 U.S. 383 (1944) the court affirmed a decision that a state could not prohibit through shipments of imported liquor for delivery to a federal military reservation. Thus, the scope of the Twenty-First Amendment is confined to the exercise of state regulations that affect interstate commerce into its territory.

This conclusion is not negated by broad language contained in some earlier opinions interpreting the

Twenty-First Amendment, since those cases involved commerce clause attacks on restrictions imposed upon imported liquor. In *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404, the court said, "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth." *Mahoney* concerned a state law prohibiting the importing of certain beverages. Similarly, other opinions which have referred to grants of "broad" or "plenary" power to the States have been concerned with commerce clause issued: *State Board of Equalization v. Youngs Market,* 299 U.S. 58 (1936) [license required to import liquor]; *Zifferin, Inc. v. Reeves,* 308 U.S. 132 (1939) [restrictions on export sales validly imposed as enforcement measure related to internal sale and consumption].

The rules of the California Department of Alcoholic Beverage Control restricting the content of films and live entertainment are wholly unrelated to the transportation or importation of alcoholic beverages. The rules apply only to on-sale premises, *i.e.* premises upon which alcoholic beverages may be sold and consumed. The rules are not concerned, however, with the sale, consumption or transportation of such beverages nor are they designed to assist enforcement of such regulations. The rules, moreover, have not been challenged on account of any discriminatory effect on interstate commerce, but because they censor free expression protected by the First Amendment., Thus, the validity of the rules must be measured against the scope of the state's domestic police power, without regard to the Twenty-First Amendment.

The conclusion that the Twenty-First Amendment is concerned with interstate commerce rather than with exercise of domestic police power is buttressed and con-

firmed by the Amendment's legislative history and genealogy. The text of Section 2 is based on the Webb-Kenyon Act, c. 90, 37 Stat. 699; c. 740, Sec. 202(b); 49 Stat. 877 (27 U.S.C.A. Sec. 122) which antedates the Eighteenth Amendment and which also prohibits the shipment or transportation of intoxicating liquors into any State, Territory or District with intent that it be received, possessed, sold or used in violation of any law of such State, Territory or District. The Webb-Kenyon Act was entitled "An Act divesting intoxicating liquor of their interstate character in certain cases." It was not repealed by the Eighteenth Amendment, but remained in effect during prohibition. *McCormick and Co. v. Brown*, 286 U.S. 131 (1932). It was concerned only with commerce clause problems and did not purport to otherwise expand or affect the police power of the states. See *State of Georgia v. Wenger*, 94 F. Supp. 976 (Ill., 1950); aff'd. 187 F. 2d 285, cert. den'd. 342 U.S. 822. Similarly, the incorporation of the Webb-Kenyon Act into the constitution at the time of repeal did not affect or enlarge the police power of the states, but merely permitted the exercise of such power free from considerations of interstate commerce in most cases.

B. The State's Power to Restrict or Censor Speech and Expression Protected by the First Amendment Is Not Increased Merely Because the Use or Consumption of Alcoholic Beverages Is Involved.

In this section we shall be concerned with the question of whether a state may, in exercising its police power with respect to the sale and consumption of alcoholic beverages, prohibit the exercise of free speech by laws which would otherwise violate the First Amendment. In other arguments we shall show that Rules

143.3 and 143.4 do prohibit speech and expression protected by the First Amendment and that they are not justified by any compelling public purpose.

There are, of course, numerous older cases which suggest the power to control the liquor trade is so broad and untrammelled that a constitutional challenge to any state law, no matter how unconstitutional, arbitrary or discriminatory must fall. *e.g. Crowley v. Christiansen,* 137 U.S. 86 (1890). Such cases were often based upon the proposition that since a state may prohibit the use of liquor completely it may condition its use in any manner whatsoever, *e.g. Cronin v. Adams,* 192 U.S. 108 (1904); *Seaboard Airline Railway v. North Carolina,* 245 U.S. 298 (1917). However, in recent years, the courts have discredited the notion that the exercise of a "privilege" may be conditioned upon the relinquishment of constitutional rights, both with respect to liquor regulation and to such other closely related areas as public employment and the receipt of public grants.

> "Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled decision.
>
> ". . . Neither is the assertion that liquor may be a menace to public health and welfare a sufficient answer to Mrs. Hornsby's allegations. The potential social undesirability of the product may warrant absolutely prohibiting it, or, as the Aldermanic Board has done to some extent here, imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards." *Hornsby v. Allen,* 326 F. 2d 605, 609 (5th Circ., 1964).

The most recent example of these principles is *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), which held that the state could not post a notice characterizing an individual as an excessive drinker and forbidding the sale of liquor to such individual without affording notice and an opportunity to be heard. Thus, it was established that the police power over liquor does not override the due process clause.

This approach was foreshadowed in *Joseph E. Seagrams & Sons, Inc. v. Hostetter, supra*, 384 U.S. 35, 46-52 (1966), in which the court upheld a "minimum-price" law for liquor against claims that it violated due process and equal protection. In so doing, however, the court relied on generally applicable standards of due process adjudication without referring to any supposedly extraordinary powers to regulate the sale of liquor.

There are numerous other areas in which the court has held that the granting of a privilege or the performance of a service could not be conditioned in a manner which violated constitutional rights.

In *Shelton v. Tucker*, 364 U.S. 479 (1960) it was held that employment of public school teachers could not be conditioned upon the filing of reports which restricted the freedom of association protected by the First Amendment.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969) it was decided that the right to receive public welfare payments could not be denied upon grounds that amounted to a denial of equal protection and the right to travel between states.

In *Sherbert v. Verner*, 374 U.S. 398 (1963) it was held that unemployment benefits could not be denied to an applicant who refused work for religious

reasons. In that case, the court said, at page 404, "It is too late in the day to doubt that the liberties of religion or expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In *Speiser v. Randall*, 357 U.S. 513 (1958) the court held that the grant of a tax exemption could not be conditioned upon the exercise of an unconstitutional loyalty oath. In *Baggett v. Bullitt*, 377 U.S. 360 (1964) the court held that public employment could not be conditioned upon the exercise of an unconstitutional loyalty oath.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968) it was held that a public school teacher could not be fired for making derogatory statements about his employer that fell short of actionable libel of a public official under the First Amendment.

Thus, the so-called traditional police power with respect to the control of intoxicating liquor cannot itself justify rules which restrict First Amendment freedoms. Liquor control is not a magic talisman justifying whatever restrictions the state chooses to impose. Rather, so long as the State chooses to permit public drinking in bars and taverns, it may not restrict the privilege of operating such premises in an unconstitutional manner.

It is of the utmost importance that the Supreme Court of the State of California has itself held that California's authority to control the sale and consumption of alcoholic beverages is bounded by the limits set by the United States Constitution. In *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971) the court held unconstitutional Section 25656 of the California Business and Professions Code which prohibited the employment of female bartenders in certain circumstances. In an extensive opinion the court held that

the section was preempted by the 1964 Civil Rights Act, from which no protection was afforded by the Twenty-First Amendment. The court held at 5 Cal. 3d, pages 10-15 that the authority granted by the Twenty-First Amendment to control the importation of intoxicating liquor could not be construed to discriminate in a manner prohibited by the Federal Civil Rights Act. The court also held, at 5 Cal. 3d pages 16-20 that the statute violated equal protection and did not fulfill the compelling public interest necessary to justify a discrimination based upon sex. By so holding the court established that statutes and regulations concerned with alcoholic beverages must be measured by the same constitutional standards as is state action in other fields. It follows that the California Department of Alcoholic Beverage Control cannot claim to possess "traditional power" to ignore such standards, such power having been denied it by the highest court of the State.

III.

Rules 143.3 and 143.4 Are Overbroad and Vague in Violation of the First and Fourteenth Amendments.

A. A Governmental Purpose May Not Be Achieved by Means That Invade Constitutionally Protected Rights.

The principle of overbreadth in First Amendment cases applies where a statute, no matter how precise or clear it may be, sweeps unnecessarily broadly and thereby invades the areas of protected freedoms. *Zwickler v. Koota,* 389 U.S. 241 (1967); note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev., 844, 852-858, 871-882 (1970). "Overbreadth" is a corollary of the rule that even incidental restrictions on First Amendment freedoms will not stand unless drawn with narrow specificity. *N.A.A.C.P. v. Button,* 371 U.S. 415, 432 (1963).

The reason behind the rule prohibiting overbroad statutes is that their existence is a *per se* inhibition upon the exercise of First Amendment rights, notwithstanding that enforcement of the law against protected activities in individual cases could be successfully defended on constitutional grounds.

As the court has said:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that may inhibit the full exercise of First Amendment freedoms. See, e.g. *Smith v. California*, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt*, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .'" *Dombrowski v. Pfister*, 370 U.S. 479, 486 (1965).

A law which fails to exclude protected rights should not merely be declared unconstitutional as applied in protected situations, but should be declared unconstitutional in its face as an antidote to the chilling effect on the exercise of such rights caused by the mere existence of the law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dombrowski v. Pfister, supra*, 380 U.S. 479 (1965); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Butler v. Michigan*, 352 U.S. 380 (1956).

B. The Constitutional Prohibition Against Overbroad Laws Is Not Limited to Penal Statutes.

The instant case does not involve penal statutes. It does involve Rules promulgated by the California Department of Alcoholic Beverage Control which set forth grounds upon which a state license to sell alcoholic beverages may be suspended or revoked. This is, however, a distinction without a difference, for it is well established that the First Amendment freedoms embodied in the "overbreadth" rule apply equally to all forms of state action, whether licensing or administrative, whether formal or informal.

In *Bantam Books v. Sullivan,* 372 U.S. 58, 66-67 (1963), the court upheld an injunction against the activities of a State Censorship Commission whose duties were to give informal advice as to the obscenity or immorality of various books but whose advice was not legally binding. The court said,

> "it is true that appellant's books have not been seized or banned by the state, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed objectionable and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that the informal censorship may sufficiently inhibit circulation of publication to warrant injunctive relief."

More recently, in *Blount v. Rizzi,* 400 U.S. 410 (1971), the court applied procedural limitations on

censorship of obscenity to administrative proceedings in the Post Office Department. See also *Freedman v. Maryland*, 380 U.S. 51 (1965).

The restrictions on First Amendment rights embodied in Rules 143.3 and 143.4 cannot be justified upon the grounds that such restrictions are related to the control of alcoholic beverages which is a matter of great importance to the state. Violation of those rules could result in the loss of a valuable business and the right to engage in an occupation. In numerous cases, the court has applied the First Amendment protection against overbroad laws to such areas of state concern as the regulation of the practice of law and the selection and retention of public employees and the protection of juveniles. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1970); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *N.A.A.C.P. v. Button, supra*, 371 U.S. 415 (1963); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Butler v. Michigan*, 352 U.S. 380 (1952). Thus, neither the subject nor the source nor the method of enforcement of Rules 143.3 and 143.4 avoids the applicability of the First Amendment protection againt overbreadth in the instant proceedings.

C. Non-Obscene Communications Are Protected by the First Amendment.

As we have already shown, Rules 143.3 and 143.4 are concerned with controlling the contents of recognized forms of expression which are protected by the First Amendment, including the exhibition of motion pictures, slides, photographs and paintings and the presentation of live entertainment, including plays.

dances, vaudeville and burlesque. It is self-evident that the purpose of the Rules is to prohibit and restrict the depiction of sex and nudity therein. Expression which depicts or portrays sex or nudity is fully protected by the First Amendment unless it is obscene. *United States v. Reidel,* 402 U.S. 351 (1971); *Roth v. United States,* 354 U.S. 476 (1957). In *Reidel,* the court reaffirmed the ruling in Roth that obscenity is not within the area of constitutionally protected speech or press. The other side of the coin is that non-obscene depictions of sex or nudity are protected as free speech "from governmental suppression, whether criminal or civil, *in personam* or *in rem.*" *Redrup v. New York,* 386 U.S. 767, 770 (1967). Rules 143.3 and 143.4 would therefore be unconstitutionally broad if not restricted to the prohibition of the obscene.

D. Rules 143.3 and 143.4 Prohibit Depictions of Sex or Nudity Which Are Not Obscene.

The District Court found that the Rules prohibited non-obscene expression because they failed to take into account the matter as a whole, did not require a determination of the predominant theme of the material, did not consider contemporary community standards, and applied whether or not the presentations had redeeming social importance (Memorandum Opinion, pp. 9-10, 13-14; *Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Redrup v. New York, supra,* 386 U.S. 767 (1967)).

The correctness of the District Court's ruling does not appear to be in dispute in this appeal. It is appellant's position that the Rules either are not concerned with speech or that alternatively, they are valid incidental restrictions on speech, but appellant concedes

that "[t]he instant State Regulations . . . do not deal with obscenity." (Appellant's Brief, p. 15).

The extent to which the Rules ignore the standards of obscenity is evident from their texts. Rule 143.4 prohibits the exhibition of motion pictures, still pictures, electronic reproductions or other visual reproductions which depict acts *or simulated acts* of sexual intercourse, masturbation, or other sexual acts, whether or not obscene. The Rule prohibits depictions of any person being touched, caressed or fondled on the breasts, buttocks, anus, or genitals, whether or not obscene. The rule prohibits the depiction of scenes wherein a person displays the vulva, the anus or the genitals, whether or not obscene. The rule also prohibits the depiction of scenes in which artificial devices, inanimate objects or drawings are used to portray any of the prohibited activities. Rule 143.3 imposes the same restrictions on live entertainment of all types. Rule 143.3 additionally forbids display of the pubic hair, which effectively prohibits the use of total nudity in live entertainment, and forbids as well even the "simulation" of nudity and all the other acts described above.

The fatal defect in these rules is that they ignore the constitutional requirement that the work must be judged as a whole, rather than on the basis of isolated passages. *Roth v. United States*, 354 U.S. 476 (1967). By enacting these Rules, appellant has attempted to turn back the clock by substituting a series of *per se* prohibitions that would condemn a film or live performance without regard to its predominant appeal or social value. See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Redrup v. New York*, 386 U.S. 767 (1967). It follows that the Rules would prohibit the exhibition of films or performances which are not ob-

scene and which are therefore entitled to full protection under the First Amendment. *Redrup v. New York, supra.*

The validity of these conclusions is buttressed by the fact that the rules would forbid the exhibition in a bar of films or live entertainment which has been held not to be obscene. Both rules 143.3 and 143.4 would prohibit complete nudity, which has been held on numerous occasions not to be obscene as a matter of law. *Central Magazine Sales Ltd. v. United States,* 389 U.S. 50 (1967) (reversing a finding of obscenity with respect to magazines containing photographs which focused attention on the female pubic area; case below, *United States v. Central Magazine Sales Ltd.,* 318 F. 2d 821 (4th Cir. 1967); *Luros v. United States,* 389 F. 2d 200 (8th Cir. 1968) (holds that pictures depicting male and female pubic hair or genitalia are not obscene). Under Rule 143.4, such pictures could not be displayed in a bar or tavern, even though they are not obscene.

In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this court held that a movie, "The Lovers" which contained an "explicit love scene" was not obscene. Whether the scene depicted actual or simulated sexual intercourse, the film could not be shown in a bar in the State of California, notwithstanding that the film was held not to be obscene. In *Pinkus v. Pitchess,* 429 F. 2d 416 (9th Cir. 1969), aff'd. *sub. nom. California v. Pinkus,* 400 U.S. 922 (1970), a film depicting a nude female who lays on a couch, undulating and feigning sexual satisfaction was held not to be obscene. That film could not be shown in a bar under Rule 143.4. See, also, *United States v. 35 m.m. Motion Picture Film,* 432 F. 2d 705 (2nd Cir. 1970); *United States v. One*

Carton Positive Motion Picture Film, 367 F. 2d 889 (2d Cir. 1966).

The true purpose of the Rules is clear both from their texts and the arguments proffered by Appellant in their support. That purpose is to impose a prior restraint on speech which is not itself unlawful or harmful to others but which is believed to induce other violations of other laws. The Rules are akin to statutes which prohibit incitements to riot. They seek to prevent harms indirectly and at a distance; they are some distance removed from the evil sought to be prohibited.

Examples of Appellant's position are readily drawn from its brief. On page 3, at footnote 2, Appellant characterizes the record as establishing that certain consequences injurious to public welfare and morals *result from* or are *attendant to* the acts and conduct prohibited by the Rules. There follows a list of such consequences, *most of which are not directly prohibited by the Rules, and all of which are prohibited by other statutes and Rules* (See Appendix I to this brief). On pages 5 through 9 of Appellant's Brief, a detailed list is set forth of the act and conduct allegedly *"resulting from"* the presentation of live entertainment or the exhibition of visual displays as prohibited by Rules 143.3 and 143.4. Of the items contained in the list, those listed under (b) through (1) on pages 7 through 9 are expressly concerned with acts not prohibited by Rules 143.3 and 143.4. Of the items listed under (a) on pages 5 through 7, only a few are directly prohibited by Rules 143.3 (none of the items listed involve so-called visual displays); many of those items are also prohibited by other laws or by portions of Rules 143.2 and 143.3 which were not held invalid by the District Court (See Appendix I to this brief).

Thus, Appellant's parade of horribles is not a list of evils directly prohibited by Rules 143.3 and 143.4 but is rather a list of evils which Appellant feels will be *indirectly* prevented by imposing restrictions on speech and expression which it is thought might induce or promote such evils.

But, as is implicit in Appellant's argument, virtually all the wrongful acts listed in his brief are already unlawful (See Appendix I). Indeed, the testimony from which the list was compiled was given by law enforcement officials who are reciting events that had been the subject of arrests and prosecution. The State is not lacking in tools to enforce such laws, as much as it may complain about the expense and inconvenience of such enforcement.

At page 15 of its brief, Appellant again underscores the proposition that these rules are overly broad by stating:

> "The instant State regulations however do not deal with *obscenity*. In the instant regulations, the State is not attempting to proscribe the acts and conduct because they are *obscene* and therefore contrary to public welfare and morals, but because of other important and substantial state interests which are injured when such acts and conduct are permitted on premises wherein the public are consuming alcoholic beverages."

Again, at page 20 of its brief, Appellant argues that:

> "The instant regulations further substantiate State interests by preventing the employment and use of such conduct and displays on on-sale alcoholic beverage premises, *thereby removing catalysts* which, when added to the sale and con-

> sumption of alcoholic beverages, *induce and produce* such adverse results. In such an important and sensitive area as alcoholic beverage control, *the State should not be required to wait and allow the resultant injurious activities to occur and then discipline the alcoholic beverage licensee only after the harm to the California public has already occurred.*" (Emphasis added).

Thus, Appellant spells out that Rules 143.3 and 143.4 were not adopted to prohibit acts unlawful in themselves but were adopted to prohibit other harms which might result therefrom. The Rules are, therefore, conceded by Appellant to be over broad.

E. Rules 143.3 and 143.4 Are Unconstitutionally Vague and Uncertain.

The scope of this attack for vagueness and uncertainty is limited to the words ". . . Simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or sexual acts which are prohibited by law." as used in Alcoholic Beverage Control Rule 143.3 (Entertainers and Conduct) and also as used in Alcoholic Beverage Control Rule 143.4 (Visual Displays).

The classic formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 3222 wherein he stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part render them liable to its penalties, and a well recognized requirement consistent with ordinary

notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Webster's Collegiate Dictionary defines simulate as follows:

"Simulate: Feigned. To assume the appearance of, without the reality; to feign."

Webster's new International Dictionary defines the word simulate as follows:

"Simulate: To assume the mere appearance of, without the reality; to assume the signs or indications of, falsely, to counterfeit, feign, imitate; as, to simulate insanity or loyalty . . ."

"Where a statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to assume were intended to be made criminal, it would be declared void for uncertainty." *Winters v. People of the State of New York,* 333 U.S. 507, 68 S. Ct. 665.

When one is simulating one of the prohibited acts, must one have an intent to do so? Would the test be a subjective test or should it be an objective test? It is arguable that when one dances (dressed or undressed) in the modern fashion one might to some persons "simulate an act of sexual intercourse." Further, the opening of the mouth by a dancer or the movement of a tongue by a dancer might to some persons simulate an act of oral copulation.

Since the above mentioned common acts of parties could be reasonably assumed not to be violative of the Alcoholic Beverage Control rules when innocently performed as well as not to be violative of the Alcoholic Beverage Control rules, the said rules dealing with "simulated activity" are vague and uncertain and therefore void.

F. The Department Rules Impose a Prior Restraint, Since They Contain No Requirement of Scienter.

It has been well observed that the doctrine of constitutional overbreadth, already discussed, exists to protect free speech from the chilling effect and, therefore, prior restraint, of overbroad statutes. Note, "The First Amendment Overbreadth Doctrine", 83 Harv. L. Rev., 844, 846 (1970). We are concerned here with another branch of prior restraint, namely the requirement that a proper statute directed at the control of obscene speech must contain a requirement of scienter.

Thus, in *Smith v. California*, 361 U.S. 147 (1960), the court reversed the conviction of a Los Angeles book seller for selling obscene publications on the grounds that the ordinance under which he was convicted did not contain a requirement that he have any knowledge of the content of the books. The court explained its decision on the grounds that the imposition of strict liability upon a book seller would induce so much self-censorship as to restrict the circulation of constitutionally protected materials. The court said:

> "For if the book seller is criminally liable without knowledge of the contents and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected and thus the State will have imposed a restriction upon the

distribution of constitutionally protected as well as obscene literature." *Smith v. California,* 361 U.S. at page 153.

The new rules of the California Department of Alcoholic Beverage Control apply to any of the forms of prohibited activity whether or not the licenseee has actual knowledge of the events. Cases cited under other Department rules have made it clear that in California a licensee may "permit" activity on his premises without actually knowing about it.

A recent case involved the suspension of a license for a single act of bookmaking by a bartender. The evidence established that the act was an isolated one and that neither the general manager nor any other responsible officer of the corporate licensee had any knowledge of the act. The court said:

> ". . . a licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations, 'There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation.' " *Reimel v. Alcoholic Beverage Control Appeals Board,* 252 Cal. App. 2d 500, 60 Cal. Rptr. 641, 643 (1967).

The court went on to observe that the absence of a responsible manager from the premises was also irrelevant "in view of the obligation which the constitution places upon the licensee to assure the operation of his business in a manner not contrary to public welfare and morals." *Reimel v. Alcholic Beverage Control Appeals Board, supra,* 60 Cal. Rptr. at page 643.

Apparently, then, Rules 143.3 and 143.4 impose strict liability upon a licensee for both obscene and non-obscene acts of his employees in the premises, whether or not he has knowledge of them, and imposes upon him the responsibility, either personally or through responsible employees, of keeping a close watch on both his employees and entertainers to make sure that no violation of the rules occur. Few more pervasive forms of censorship can be imagined.

IV.

The Alcoholic Beverage Control Rules Do Not Meet the Criteria Set Down in United States v. O'Brien (1968), 398 U.S. 367.

A. The Rules Abridge Free Speech on Their Face.

This Court stated in *O'Brien*, at page 374:

> "We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended Section 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct."

The Rules herein proscribe conduct only and make no reference to the spoken word. As hereinbefore demonstrated, the First Amendment protects the performing arts unless obscene. The performing arts combine conduct and the spoken word. To proscribe acts of conduct in a performance is to proscribe the performance. Free speech would mean little if it were restricted, in a theatrical performance, to speaking about the content of the play or dance without the right to demonstrate.

Hence, the Rules proscribe the play or the dance or the movie in its entirety, abridging free speech on their face.

B. The Regulation of the Use and Sale of Alcoholic Beverages Constitutes a State Interest. However, Not Every State Interest Permits Invasion of First Amendment Rights When Such Interests May Be Satisfied by the Use of Less Drastic Measures.

Appellant cites various evils from the testimony taken before the Director of Alcoholic Beverage Control. In every instance thereof, the conduct is prohibited by a California Penal Code Section, *i.e.*, California Penal Code Section 311 (g).[1]

Appellant insists upon going further. He seeks to prohibit this conduct when it takes place as an integral part of a First Amendment activity, and the activity is not obscene within the meaning of *Roth* and its progeny. Appellant contends that the added element of alcohol in the bloodstream of the customer is the important State interest which permits a curtailment of First Amendment rights. Assuming, *arguendo*, that there is empirical basis for that claim, it would appear to be better practice to limit the customer's content of alcohol rather than to limit the customer's Constitutional rights.

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[1]311(g) Penal Code:

" 'Obscene live conduct' means any physical human body activity whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance."

This is easily accomplished under California's existing laws.[2] If Appellant is concerned about the conduct of the customer that is under the influence of alcoholic beverages, he should strictly enforce California existing consumption laws so that the customer will be under his own influence and therefore be permitted to view any material which does not lose its First Amendment protection when judged by existing standards.

C. The Rules Being Challenged Herein Do Not Further Any Important or Substantial Governmental Interest. United States v. O'Brien, 398 U.S. 367.

O'Brien stands for the proposition that draft registration cards are necessary to make a selective service system operate efficiently in connection with the Government's power to raise armies. There is no showing in the record that the proscribed conduct, having taken place in the context of a First Amendment activity, results in an increased consumption of alcohol or that the claimed evils necessarily result from the proscribed conduct. In view of the numerous statutes prohibiting the other evils with which the Department purports to be concerned, the instant Rules cannot be said to further any governmental interest in any significant degree. (See Appendix I.)

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[2]647(f) California Penal Code:

"Every person . . . is guilty of disorderly conduct, a misdemeanor; (f) Who is found in any public place under the influence of intoxicating liquor. . . ."

See also Business & Professions Code Section 25602:

"Every person who sells, furnishes, . . ., any alcoholic beverage to . . . any obviously intoxicated person is guilty of a misdemeanor."

D. The Rules Fail to Meet That Portion of the O'Brien Test Which Requires That the Governmental Interest Be Unrelated to the Operation of Free Expression.

The governmental interest in *O'Brien* was to create an efficient Selective Service in support of the right of the government to raise armies.

The issuance of a draft registration card has a direct and necessary purpose in the system. Because *O'Brien* chose to demonstrate his objection to the Viet Nam war by burning his draft card, it does not necessarily follow that the 1965 Amendment was enacted to curtail such demonstrations. It had a separate, independent and necessary purpose.

The instant Rules are a direct affront to free expression. There can be no unrelated purpose in that it must be presumed that a customer not under the influence of alcohol should be prohibited from viewing the proscribed acts when they take place in a First Amendment activity any differently than if he saw them in a theatre. If he is under the influence of alcohol, he shouldn't be on the premises at all, (Calif. P. C. §647-(f)), hence the only persons upon whom the rules will have any effect are those customers not influenced by the alcohol.

E. The Rules Fail to Meet That Part of the O'Brien Test Requiring That the Incidental Restriction on Alleged First Amendment Freedoms Is No Greater Than Is Essential to the Furtherance of That Interest.

Rules 143.3 and 143.4 are not in any manner of speaking incidental restrictions on free speech. They are directed at speech on their face and impose express restrictions on such speech. They, thus, do not meet the *O'Brien* requirement of being "unrelated to the suppression of free expression."

In this regard, Appellant's attack upon the finding by the District Court that the Rules were intended to circumvent constitutional restrictions relating to the prosecution of obscenity is seen to be unfounded. Appellant, without reference to the record, relies upon the proposition that a court should not assume the existence of improper motives to defeat otherwise valid legislation. The District Court referred to three excerpts from the administrative hearings to support its proposition. It could have cited many more. Almost all of the witnesses who testified before the Department of Alcoholic Beverage Control in support of the Rules were law enforcement officers or prosecuting attorneys. Almost to a man they requested enactment of the Rules to relieve their burden of enforcing criminal laws. A common refrain throughout the hearings was the difficulty, cost, delay and uncertainty of criminal law enforcement against dancers and movies. It is thus more than reasonable to conclude that the Rules were designed to circumvent the difficulties attendant upon proving obscenity in criminal cases.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the Court below enjoining the enforcement of California Department of Alcoholic Beverage Control Regulations #143.3 and #143.4 should be affirmed.

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APPENDIX I.

List of Statutes and Rules Which Directly Prohibit or Regulate the Occurrences Listed on Page 3, Footnote 2 of Appellant's Brief and on Pages 5 Through 9 of Appellant's Brief Under "(3)".

(a) "Overt Improper and Unlawful Physical Acts and Conduct by the entertainer—employees and by, or with, the customers."

Calif. Penal Code	Conduct Prohibited
Sec. 288(a)	Oral Copulation
Sec. 311.6	Obscene Live Conduct
Sec. 314.1	Indecent Exposure
Sec. 314.2	Aiding, abetting or procuring indecent exposure
Sec. 647(a)	Lewd conduct in Public Place
Sec. 647(b)	Prostitution

(b) " 'B-girl' activity, solicitation of drinks."

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 25657	Employment of person to encourage or procure purchase or sale of liquor.

(c) "Prostitution in and around such premises, including solicitation on the premises involving some of the dancers, and acts of prostitution in dressing rooms."

Calif. Penal Code	Conduct Prohibited
Sec. 647(b)	Prostitution and solicitation of prostitution.

(d) Sale, possession and use of narcotics and dangerous drugs in and around such premises.

Calif. Health & Safety Code (partial list)	Conduct Prohibited
Sec. 11500	Illegal possession of narcotics.
Sec. 11501	Illegal sale of narcotics.
Sec. 11721	Illegal use of narcotics.
Sec. 11910	Illegal possession of dangerous drugs.
Sec. 11912	Illegal sale of dangerous drugs.

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 24200.5(a)	Knowingly permitting sale of narcotics or dangerous drugs on licensed premises.

(e) "Other violent crimes in and around premises including shootings, robberies, assaults, kidnapping and murders."

(The various California Penal Code sections applicable to these "violent crimes" need not be listed individually)

(f) "Exploitation of customers, including charging $3 for a drink, soliciting the money for operation of coin fed film projectors, soliciting money for jukebox, renting flashlight so customers can better observe girls' vaginal areas, etc."

(g) "Overt sex crimes resulting from drinking and viewing such entertainment on on-sale premises, including indecent exposure to young girls, attempted rape and rapes."

(The various California Penal Code sections applicable to "overt sex crimes" need not be listed individually)

(h) "Drunkenness and intemperance on such premises."

Calif. Penal Code	Conduct Prohibited
Sec. 647(f)	Public intoxication

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 25602	Sale of Alcoholic Beverage to obviously intoxicated person.

(i) "Minors on Premises."

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 25658	Sale of Alcoholic beverage to minors.
Sec. 25653	Employment of minor in on-sale premises.
Sec. 25665	Minors entering and remaining on public premises.

(j) "Serious and extensive law enforcement problems."

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 25601	Maintenance of disorderly house.

(k) "Assaults on police officers at such premises."

Calif. Penal Code	Conduct Prohibited
Sec. 148	Resisting, delaying or obstructing officer in discharge of duty.
Sec. 240, 241	Assault
Sec. 242, 243	Battery

(l) ". . . alcoholic beverage control violations and the conditions contrary to public welfare and morals . . ."

Calif. Bus. & Prof. Code	Conduct Prohibited
Sec. 24200(a)	Continuance of license contrary to public welfare or morals.
Sec. 24200(b)	Violation of Alcoholic Beverage Control Act or Department Rules.
Sec. 24200(d)	Conviction of crime involving moral turpitude.
Sec. 24200(e)	Failure to correct public nuisance.